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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 112

FRANCES DE CRIGNIS VON WEDEL, PETITIONER

v.

HONORABLE J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (R. 18-24) is reported at 180 F. 2d 716. The opinion of the United States District Court for the District of New Jersey (R. 10a-12a) is reported at 84 F. Supp. 299.

JURISDICTION

The judgment of the Court of Appeals was entered March 8, 1950 (R. 24). The petition for

writ of certiorari was filed June 5, 1950. The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 of the United States Code.

QUESTION PRESENTED

Whether the courts below, in holding that a power of attorney was insufficient to authorize a gift of the principal's property, decided an important question of New York law in conflict with the law of that State.

STATEMENT

This is a suit brought under Section 9(a) of the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. 9(a), for the return of certain securities and cash which were vested by the Attorney General, as successor to the Alien Property Custodian,[1] as property of an enemy national.

The complaint alleges the following: Petitioner is a citizen and resident of the United States (Complaint, Pars. 1, 3, R. 2a), married to Carl J. R. H. von Wedel, who was at all times material to this case a national and resident of Germany (Pars. 4, 5, R. 2a-3a). On July 5, 1939, petitioner and her husband left the United States for Europe. In anticipation of the possibility of war Carl von Wedel executed in New York a power of attorney

[1] By Executive Order No. 9788 (October 15, 1946, 11 F. R. 11981) the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief the terms "Alien Property Custodian" or "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

to Pieter J. Kooiman (Par. 4, R. 2a-3a; Ex. A, R. 5a-6a). The power opens with a grant of "the fullest power" to deal with von Wedel's property. There follows a detailed recital of specific powers granted, all of which are normal incidents to the conduct of the business affairs of Carl von Wedel. The complaint further alleges that: "An express primary object of the giving of the power of attorney was to enable the donee to dispose of all or part of the donor's property in the United States by gift to the plaintiff herein or otherwise * * *" (Par. 4, R. 3a). No such object is stated in the instrument, nor does it contain any words authorizing the making of a gift of Carl von Wedel's property. After the outbreak of war, petitioner returned to the United States in December 1939; but Carl von Wedel was "prevented, by causes beyond his control, from returning to the United States" (Par. 5, R. 3a). Between January 16 and October 9, 1940, the attorney-in-fact purported to make a series of transfers in New York to petitioner, by way of absolute gift, of the American property of Carl von Wedel (Par. 6, R. 3a-4a). Thereafter, the Custodian vested the property as property of Carl von Wedel, an enemy national (Pars. 7-8, R. 4a).

On respondent's motion to dismiss the complaint for failure to state a claim on which relief may be granted (R. 9a) judgment of dismissal was entered June 14, 1949 (R. 12a). In his opinion (R. 10a-

12a), the District Judge held that "no authority to make a gift can be ascertained from the terms of the power itself," and that parol evidence could not supply such authority. The Court of Appeals affirmed the judgment of the District Court (R. 18-24).

ARGUMENT

Although arising in connection with the administration of a federal statute, this case presents only questions of New York law and of the construction of a particular instrument. The Court of Appeals held that the power of attorney should be strictly construed and that accordingly the rule of *ejusdem generis* should be applied to confine the grant of general authority in its opening phrases to the area indicated by the later specific grants. Its decision that formal written powers of attorney should be strictly construed is entirely consistent with the law of New York and most other jurisdictions.[2] That rule is particularly applicable where, as here, the attorney-in-fact asserts authority to make a gift of the principal's property. Impressed with the dangers of reckless dissipation of the principal's property which would ensue from a ready implication of the unusual power to make a gift of

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[2] *E. g., Rossiter* v. *Rossiter*, 8 Wend. 494; *Craighead* v. *Peterson*, 72 N. Y. 279, 284; *Porges* v. *United States Mortgage & Trust Co.*, 203 N. Y. 181, 96 N. E. 424; *Brassert* v. *Clark*, 162 F. 2d 967 (C. A. 2); *Lanahan* v. *Clark Car Co.*, 11 F. 2d 820 (C. A. 3); *Williams* v. *Dugan*, 217 Mass. 526; *Restatement of the Law of Agency*, § 37.

that property, the courts have unanimously refused to construe powers of attorney as authorizing gifts in the absence of express language unambiguously conferring such authority.[3]

Nothing in the New York cases cited by petitioner is to the contrary. Petitioner cites only one New York case relating to a power of attorney, *Porges* v. *United States Mortgage & Trust Co.*, 203 N. Y. 181, 96 N. E. 424.[4] That case did not involve an asserted power to make a gift. It held that a broad grant of authority "to dispose of the property" of the principal was insufficient to authorize the attorney-in-fact to indorse in the principal's name a check received in connection with the disposal of that property. It thus supports the rule of strict construction applied by the court below.

Petitioner asserts that in New York "the rule of *ejusdem generis* is normally not to be applied to writings where the general power precedes the

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[3] *Kaname Fujino* v. *Clark*, 71 F. Supp. 1 (D. Haw.), affirmed, 172 F. 2d 384 (C. A. 9), certiorari denied, 337 U. S. 937; *Miyuki Okihara* v. *Clark*, 71 F. Supp. 319, 322 (D. Haw.); *Mott* v. *Smith*, 16 Cal. 533, 557; *Bertelsen* v. *Bertelson*, 49 Cal. App. 2d 479, 484, 122 P. 2d 130, 133; *Brown* v. *Laird*, 134 Ore. 150, 291 P. 352; *Smith* v. *Powell*, 5 Tex. Civ. App. 373, 23 S. W. 1109.

[4] *Matter of Zalewski*, 292 N. Y. 332, 55 N. E. 2d 184, involved the construction of a treaty provision authorizing a Polish consul to act as attorney-in-fact for an absent national of Poland. *Murphy* v. *City of New York*, 190 N. Y. 413, 83 N. E. 39, involved the interpretation of a general release. *Cohen* v. *Bass, Inc.*, 246 N. Y. 270, 158 N. E. 618, involved the construction of a lease agreement. The only other case cited is a British decision relating to the construction of a charter party agreement.

particular powers" (Pet., pp. 9-10). In this connection she cites *Murphy* v. *City of New York,* 190 N. Y. 413, 83 N. E. 39, a case which involved not a power of attorney but a release. Even in the construction of releases, however

> * * * the courts of New York accept the common law doctrine that in a release words of general import, followed or preceded by words relating to specific claims, are, ceteris paribus, limited to the specific claims. [*Vines* v. *General Outdoor Advertising Co.,* 171 F. 2d 487, 492 (C. A. 2).][5]

Nothing in the *Murphy* case contains any suggestion to the contrary.

Petitioner also cites *Cohen* v. *Bass, Inc.,* 246 N. Y. 270, 158 N. E. 618, a case involving a lease agreement. The court's refusal to apply the rule of *ejusdem generis* in that case rested, however, on its conclusion that in the instrument there under consideration the general and the particular words appeared in two separately numbered clauses which "relate to two distinct situations and are to be read disjunctively" (246 N. Y. at 276, 158 N. E. at 620). Hence that case also wholly fails to establish the rule for which petitioner contends.

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[5] See *Romain* v. *Sweet,* 57 App. Div. 613, 68 N. Y. S. 516; *Haskell* v. *Miller,* 221 App. Div. 48, 222 N. Y. S. 619, affirmed, 246 N. Y. 618, 159 N. E. 675; *Matter of Quick's Estate,* 147 Misc. 28, 34, 263 N. Y. S. 146.

CONCLUSION

The petition for a writ of certiorari should be denied.

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JULY, 1950.

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